IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 39 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA
and
Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

UNITED INDIA INSURANCE CO.LTD.

Versus

BHIKHAJI DHANJISHA VARIYAVA

Appearance:
MR PV NANAVATI for Petitioner
MR DR BHATT for Respondent No. 1
DELETED for Respondent No. 3
NOTICE SERVED for Respondent No. 4, 5

CORAM : MR.JUSTICE D.C.SRIVASTAVA
and
MR.JUSTICE H.K.RATHOD

Date of decision: 06/07/2000

ORAL JUDGEMENT

[Per : D.C.Srivastava,J.]

The appellant, United India Insurance Company Ltd. has challenged the award of the Motor Accident Claims Tribunal, Valsad at Navsari rendered on 19th April, 1984 only to the limited extent in so far as it relates to the claim petition no. 172 of 1982. In this claim petition, compensation of Rs. 65,000/- with interest at the rate of 6% per annum together with proportionate costs was awarded against all the three opposite parties before the Tribunal jointly and severally. The contention of Shri P. V. Nanavaty, learned counsel for the appellant is that the insurance company is not liable to pay any compensation in view of the apex court's judgment in Smt. Mallawwa etc. versus The Oriental Insurance Co. Ltd. & Ors. JT 1998 (8) SC 217.

Learned counsel for the respondents, on the other hand, has argued that Smt. Mallawwa's case is not applicable to the facts of the case before this Court and that since the findings of the tribunal are not perverse, the same require no interference by this Court.

In order to appreciate the respective contentions of the learned counsel for the parties, certain admitted facts have to be kept in mind.

The accident took place on 9.1.1982 between 2 p.m. to 5 p.m. near DarokhaKhadi on the National Highway No. 8 in the sim of village Karambela. The truck GTK 5309 owned by the opponent NO.2 before the tribunal fell down in the ditch by the side of the road. It turned turtle resulting in instantaneous death of two persons Balvantbhai @ Mahendrbhai Maganbhai Patel and Naushir Bhikhaji Variyava. It was alleged that the truck was being driven by the driver Amrutlal Chunilal Modi. Consequently, compensation was claimed by the legal heirs of the deceased.

The appellant contested the claim petition denying that the driver Amrutlal Chunilal Modi was rash and negligent in driving the vehicle at the time of accident. It was also denied that the said Amrutlal Chunilal Modi was driving the vehicle at the time of accident. It was also denied that the two deceased were carrying some machinery in the truck for the purpose of repairs to some garage at Bombay. It was also denied that the deceased had paid hire charges namely fare or

freight to the owner of the truck. According to the appellant, both were gratutious passengers and that the policy did not permit use of the goods vehicle for conveyance of the passengers for hire or reward, hence, there was breach of the conditions and terms in the policy which exonerates the insurance company from the liability to pay any compensation.

The Tribunal, after considering the evidence on record, namely oral and documentary and also considering the provisions of section 59 of the Motor Vehicles Act, came to the conclusion that the deceased was not gratutious passengers. If it was a permit for public carrier purpose, there was no necessity nor there is any column in the permit that negative clause should have been introduced and incorporated that the passengers are not to be carried in public carrier. Consequently, it has to be accepted that the permit was issued for public carrier.

We have also examined the insurance policy. There seems to be prima facie breach of the terms and conditions of the insurance policy. It inter alia provides regarding limitations as to use which runs as under :

"use only under the public carriers permit within the meaning of the Motor Vehicles Act, 1939."

This is satisfied in the instant case because the permit within the meaning of the Motor Vehicles Act,1939 has been shown to us. The policy further recites that it does not cover

(1) use of organised pace making reliability trial or speed testing;
(2) use while driving trailer except for towing and other than for reward and of any one disabled mechanically propelled vehicle
(3) use of conveyance of passengers for hire or reward.

This clause 3 of limitations as to the use clearly prohibits use of public carrier for conveyance of passengers for hire or reward. The policy was in respect of the goods vehicle namely offending truck which was insured with the appellant. It was this condition in the insurance policy which was breached and consequently if the passengers were carried for hire or reward, there was obvious breach of clause 3 of the limits as to use of the goods vehicle viz. public carrier. Consequently, if the

vehicle was used in violation and breach of clause 3 of limits as to use, the liability of the insurance company stands exonerated.

Learned counsel for the respondent has urged that the vehicle was hired for carrying machine. He also urged that the fare and freight for the owner of the machine and for carrying machine namely engine of the truck for repairs to Bomway was paid to the owner of the truck, hence, the deceased was not a gratuitous passenger. We proceed on the assumption that the fare and freight was paid to the owner of the truck. It is in evidence that the truck was loaded with sand. Consequently, it is difficult to believe that the truck was hired only for the purpose of carrying engine of the motor vehicle for repairs to Bombay. On the other hand, it emerges from the evidence on record that the truck was loaded with sand weighing approximately about 9 tons and on the way, defective engine of motor vehicle owned by the deceased was loaded in the truck and it was to be carried to Bombay. Consequently, it was not a case where the truck was hired only for the purpose of carrying defective engine of motor vehicle. It is also in the evidence that the deceased was also travelling in the offending vehicle. The position will, therefore, not be changed whether the deceased was travelling as owner of the engine of motor vehicle or he was travelling with any of his own goods. He will be the passenger travelling with his own goods. It is at this juncture that the Supreme Court's verdict in Smt. Mallawwa etc. v/s. Oriental Insurance Co. (supra) can be pressed in service where the apex court has, inter alia, laid down that it is immaterial that the passenger was travelling in the goods vehicle alongwith his goods or not and also whether he has paid the fare and freight or not. The test to determine whether the vehicle in question at the time of accident was goods vehicle or the vehicle meant for carrying of passengers was specifically laid down by the apex court in this case. The apex court noticed contradictory views of various High Courts in the country on the point and approving the view taken by the Orissa High Court in New India Assurance Co. Ltd. v. Kanchan Bewa & Ors. 1994 ACJ 138, laid down correct test to determine whether the vehicle was used as goods vehicle or it was a vehicle meant for carrying passengers, section 95 of the Motor Vehicles Act which finds reference in the judgment of the tribunal was also considered by the apex court. It was laid down that for the purpose of section 95, ordinarily a vehicle could have been regarded as a vehicle in which passengers have carried if the vehicle was of that class. Keeping in

mind the classification of vehicles by the Act, the requirement of registration with particulars including the class to which it belonged, requirement of obtaining a permit for using the vehicle for different purposes and compulsory coverage of insurance risk, it would not be proper to consider a goods vehicle as a passenger vehicle on the basis of a single use or use on some stray occasions at that vehicle for carrying passengers for hire or reward. For the purpose of construing a provisions like proviso (ii) to section 95(1)(b), the correct test to determine whether a passenger was carried for hire or reward would be whether there has been a systematic carrying of passengers Only if the vehicle is so used then that vehicle can be said to be a vehicle in which passengers are carried for hire or reward.

For applying these tests, learned counsel for the respondents has urged that there is no evidence that the truck in question was used only once for carrying of passengers. However, it was difficult for the appellant to lead evidence that the truck was generally used for carriage of passengers especially in violation of the motor permit issued by the transport authorities and also in breach of the terms and conditions of the insurance policy. It can safely be said in the absence of evidence on record to the contrary that on the date of accident, the truck in question was used only on one occasion for carrying passengers alongwith their goods namely defective engine of motor vehicle. The truck was admitedly loaded with sand and it was not meant for carrying passengers even on the date of the accident. Consequently, it is not the case where even on occasion other than the date on which the accident took place the truck was used for carriage of passengers. If this was so, then the test laid down by the apex court can safely be applied to the facts of the case before us and we have no hesitation in coming to the conclusion that the truck in question was not meant for regular carriage of passengers. If it was so used on one occasion or on stray occasions for carrying passengers nature of vehicle will not be changed from goods vehicle to the vehicle meant for carriage of passengers. It is, therefore, difficult to accept the contention of the learned counsel for the respondents that section 59 does not prohibit carriage of passengers for hire and reward.

For the reasons stated above, we are of the view that the tribunal was in error in awarding compensation against the appellant United India Insurance CO.Ltd. The appeal, therefore, succeeds and is hereby allowed. The award of the motor accident claims tribunal under

challenge arising out of claim petition no. 172 of 1982 against the appellant United India Ins. CO. Ltd. who was opposite party no. 3 before the tribunal is set aside. It is, however, clarified that the award of the tribunal in this claim petition against the remaining two opposite parties shall remain in tact and shall be executable against the remaining opposite parties. Shri P.V.Nanavaty informs that the amount has been deposited in the tribunal. If the amount is available with the tribunal, as a result of success in this appeal, the tribunal shall refund the amount deposited by the appellant to the appellant. No order as to costs.

6.7.2000. (D.C.Srivastava,J.)

(H.K.Rathod,J.)

Vyas